

2014 WL 10191398 (Mass.Super.) (Trial Motion, Memorandum and Affidavit)  
Superior Court of Massachusetts.  
Middlesex County

Joseph D. McDONALD and Agnes McDonald, Plaintiffs,  
v.  
Richard CAMPBELL, and Dawn Campbell, Defendants.

No. MICV201304891.  
January 28, 2014.

**Defendant's Motion to Dismiss Complaint (Memorandum of Law Incorporated)**

The Defendants, by their Attorney, David M. Rosen, Esq., david\_rosen @guaettalaw.com, Guaetta and Benson, LLC PO Box 519, Chelmsford, MA 01824, BBO # 552866, Tel 978-513-7133, Fax (978) 250-0979.

In this action, Plaintiffs seek damages for the alleged breach of an oral contract affecting the purchase of real estate located in North Reading, MA. The alleged agreement was made in or about July, 2003. There are no writings evidencing this alleged agreement.

Pursuant to Mass. R. Civ. P. 12(b)(6), Defendants assert that Plaintiffs can prove no set of facts upon which relief may be granted because the claims are barred by the statute of frauds and/or the statute of limitations.<sup>1</sup> Defendants move for dismissal on each count of the Complaint (Fraud and Deceit, Breach of the Implied Covenant of Good Faith and Fair Dealing, Conversion, Quantum Meruit, and Violation of the **Elder** Protection Statute.

**FACTS**

As alleged in the Complaint, in July, 2003, Plaintiffs loaned the Defendants the sum of \$155,000.00 at an interest rate of 5%, which monies Defendants were to use to purchase the real estate located at 31 Park Street, North Reading, MA. See, Complaint at 5, 6. The agreement contemplated that Defendants would rehab the property, re-sell it, and repay the loan from the proceeds. See, Complaint at 7. In August, 2003, the Defendants purchased the property with the loan proceeds. See, Complaint at 8. The Defendants subsequently borrowed an additional \$20,000.00. See, Complaint at 9-10. This action followed more than ten years later.

The Complaint does not contain reference to any written agreement nor is a written agreement attached as an exhibit. There are no other documents evidencing or memorializing the terms of any such agreement. There is no promissory note. There is no mortgage. There is no loan agreement. The Complaint does not contain reference to any terms of the loan, other than it would be repaid at 5%. There is no evidence of a demand for payment or when payment was due. The Complaint does not articulate any course of dealing between the parties between August, 2003 and the date of the filing of this action, November 8, 2013. There are no allegations of any communications between the parties during this ten year period. There is no agreement here for the Court to enforce.

**ARGUMENT**

**COUNT I ALLEGING FRAUD AND DECEIT FAILS TO STATE A CLAIM**

Whether viewed as fraud in the inducement or deceit, Count I fails to state a claim as a matter of law and must be dismissed. The action is also barred by the statute of limitations.

The elements required to prove fraud in the inducement are: (1) a misrepresentation of material fact, (2) made to induce action, (3) and reasonable reliance on the false statement to the detriment of the actor. See *Commerce Bank & Trust Co. v. Hayeck*, 46 Mass. App. Ct. 687, 692 (1999), citing *Hogan v. Riemer*, 35 Mass.App.Ct. 360, 365 (1993). "Reliance is an element of actionable fraud." *Nei v. Burley*, 388 Mass. 307, 311 (1983), citing *Kilroy v. Barron*, 326 Mass. 464, 465 (1950). A claim for deceit requires proof of intent to deceive as well as proof that the plaintiff reasonably relied on the knowingly false representation. *Saxon Theatre Corp. Of Boston v. Sage*, 347 Mass. 662, 200 (1964) (plaintiff could not prevail on deceit claim where reliance on the alleged false representations would be unreasonable); *Elias Bros. Restaurants, Inc. v. Acorn Enters.*, 831 F. Supp. 920 (D. Mass. 1993) (court held that under Massachusetts law, defendants could not have "reasonably relied" on plaintiffs' alleged misrepresentations, and thus fraud-based claims fails). *Smith v. Egan*, LEXIS 446, 26 (Mass. Super. Ct. May 15, 1996). "At a minimum, a plaintiff alleging fraud must particularize the identity of the person(s) making the representation, the contents of the misrepresentation, and where and when it took place. In addition, the plaintiff should specify the materiality of the misrepresentation, its reliance thereon, and resulting harm." *Equipment & Sys. for Industry, Inc. v. Northmeadows Constr. Co., Inc.*, 59 Mass. App. Ct. 931, 931-32 (2003) (citing *Friedman v. Jablonski*, 371 Mass. 482, 488-89 (1976)).

Here, the Complaint fails to articulate any of the required elements for a fraud or deceit claim. In particular, there are no facts plead evidencing a misrepresentation of material fact or of an intent to deceive. The allegations fail to meet the specificity required by Mass. Rule Civ. P. 9(b). Accordingly, this claim must fail.

Moreover, the action would be barred by the statute of limitations governing tort claims. See G. L. c. 260, § 2A. The alleged misrepresentations took place in 2003. This action was not filed until more than ten years later. The claim is time barred.

#### **COUNT II ALLEGING BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING FAILS TO STATE A CLAIM**

It is beyond dispute that "[t]he covenant of good faith and fair dealing is implied in every contract." *Uno Rests., Inc. v. Boston Kenmore Realty Corp.*, 441 Mass. 376, 385, 805 N.E.2d 957, 964 (2004). "The covenant may not, however, be invoked to create rights and duties not otherwise provided for in the existing contractual relationship, as the purpose of the covenant is to guarantee that the parties remain faithful to the intended and agreed expectations of the parties in their performance." *Id.* In addition, "[i]n determining whether a party violated the implied covenant of good faith and fair dealing, we look to the party's manner of performance. There is no requirement that bad faith be shown; instead, the plaintiff has the burden of proving a lack of good faith." *T. W. Nicker son, Inc. v. Fleet Nat'l Bank*, 456 Mass. 562, 570, 924 N.E.2d 696, 704 (2010) (internal citation omitted).

This claim must fail because there is no enforceable contract. A writing affecting an interest in land must be in writing pursuant to the statute of frauds in order to be enforceable. Mass. Gen. L. ch.259, § 1. A promise involving real estate is enforceable only if the promise meets the requirements of the statute of frauds. *Schwanbeck v. Federal-Mogul Corp.*, 412 Mass. 703, 709 (1992). The requirements include proof of an agreement and a memorandum containing the terms of the agreement sought to be enforced. *Id.* At 710.

Here, there is no such writing. Accordingly, in the absence of an enforceable contract, there cannot be a breach of the implied covenants of good faith and fair dealing contained within that contract. In addition, the claim would fail pursuant to the expiration of the six year statute of limitations for a breach of contract. See G.L.c.260, § 2.

#### **COUNT III ALLEGING CONVERSION FAILS TO STATE A CLAIM**

The elements of conversion require that a defendant be proved to have “intentionally or wrongfully exercised acts of ownership, control or dominion over personal property to which he has no right of possession at the time ....” *Abington Natl. Bank v. Ashwood Homes, Inc.*, 19 Mass. App. Ct. 503, 507, 475 N.E.2d 1230 (1985).

In the Complaint, there are no allegations that Defendants wrongfully exercised acts of ownership over personal property. If the personal property was the money alleged to have been lent, Defendants had the right to control it and to purchase the property. That was the essence of the alleged agreement. The claim cannot be based upon the real estate because claims for conversion apply only to personal property. In any event, as a tort action, a claim for conversion is similarly governed by a three year statute of limitations. M.G.L.ch. 260, § 2A. As the alleged conversion took place in 2003, the claim is time barred.

#### COUNT IV ALLEGING QUANTUM MERUIT FAILS TO STATE A CLAIM

The term “Quantum Meruit” has been defined as follows:

“Quantum Meruit” as amount of recovery means “as much as deserved,” and measures recovery under *implied contract* to pay compensation as reasonable value of services rendered. [Citations omitted.] An equitable doctrine, based on the concept that no one who benefits by the labor and materials of another should be unjustly enriched thereby; under those circumstances, *the law implies a promise to pay a reasonable amount for the labor and materials furnished even absent a specific contract therefor*. (Citations omitted, emphasis supplied.). *Black's Law Dictionary* at 1243 (6th ed. 1990).

Quantum Meruit is the remedy for an implied contract. *SED Associates, Inc. v. Phineas Alpers Architect et al*, 1994 Mass. App. Div. 35 (1994) (citing *Fay Spofford & Thorndike, Inc. v. Massachusetts Port Authority*, 7 Mass. App. Ct. 336, 341, 387 N.E.2d 206 (1979); see also *Lonnqvist v. Lammi*, 240 Mass. 371, 373, 134 N.E. 255 (1922)).

Here, the doctrine is inapplicable because there were no services rendered, or labor or materials provided. Moreover, as a remedy for an implied contract, the claim would be time barred pursuant to Mass. Gen. Laws. Ch. 260, § 2.

#### COUNT V ALLEGING VIOLATION OF THE ELDER PROTECTION ACT FAILS TO STATE A CLAIM

The **Elder** Protection Act is codified in Mass. Gen. Laws, Chapter 19A. The Statute creates the Department of **Elder** Affairs and assigns duties and responsibilities within the department for the protection of the **elderly**, including the affirmative obligation on the part of defined care-givers to report evidence of **elder abuse** to the Department. See, section 15. However, nowhere in the statute is there contained a private right of action for victims to bring an action against the alleged violator. The statute only requires the reporting of **abuse** to the Department. Accordingly, this claim must fail. See *Parker v. Town of N. Brookfield*. 68 Mass. App. Ct. 235, 237 (2007) (“There is generally a reluctance ‘to infer a private cause of action from a statute in the absence of some indication from the Legislature supporting such an inference’”).

#### CONCLUSION

For the reasons set forth above, Plaintiffs can prove no set of facts to support viable causes of action as alleged in the Complaint. Accordingly, the Court should enter a Judgment of Dismissal on all claims in the Complaint.

Dated: December 13, 2013

Respectfully submitted,

The Defendants,

By their Attorney

<<signature>>

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Footnotes

- 1 In addition, and as argued in the Memorandum section, the Fraud claim is not plead with particularity and there is no private right of action for alleged violation of the **Elder** Protection Statute.

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